

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RONNIE BUSTAMANTE OROZCO,
Petitioner.

No. 2 CA-CR 2016-0235-PR
Filed August 8, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2011114544003DT
The Honorable Cynthia J. Bailey, Judge

REVIEW GRANTED; RELIEF DENIED

Ronnie B. Orozco, Buckeye
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Ronnie Orozco seeks review of the trial court's order denying his untimely and successive notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Orozco has not met his burden of demonstrating such abuse here.

¶2 Orozco pled guilty to theft and theft of a means of transportation and was sentenced to concurrent prison terms, the longer of which is fourteen years. He sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no claims to raise pursuant to Rule 32. Orozco filed a pro se petition claiming his trial counsel had been ineffective and there was newly discovered evidence relevant to his case. The trial court denied relief, and this court denied relief on review. *State v. Orozco*, No. 1 CA-CR 13-0015 PRPC (Ariz. App. Apr. 3, 2014) (mem. decision).

¶3 In June 2014, Orozco filed a notice of post-conviction relief claiming his convictions violated double jeopardy and were multiplicitous because they were based on his theft of the same vehicle. He also asserted his trial counsel had been ineffective for failing to raise these issues and the trial court had "abused its discretion" in finding the factual basis for his plea adequate. Orozco characterized his claims as being based on newly discovered evidence pursuant to Rule 32.1(e), asserting he had only recently obtained the "pertinent documents from his attorney, which included the charging document." The trial court summarily denied relief, concluding Orozco's claims were not based on newly

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discovered evidence and, thus, were precluded. This petition for review followed.

¶4 On review, Orozco repeats his claims and again asserts they are not precluded because they are based on newly discovered evidence. We agree with the trial court that none of Orozco's claims are encompassed by Rule 32.1(e), which permits relief based on the recent discovery of "material facts" relevant to a defendant's conviction or sentence that were unknown both to the defendant and trial counsel at the time of trial. *See State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000) ("Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence."). Rule 32.1(e) does not encompass Orozco's later discovery of what he believes are viable legal arguments. Orozco's second notice was untimely filed, and he has identified no basis for his claims that is exempt from the timeliness requirement of Rule 32.4(a).¹ Thus, the trial court did not abuse its discretion in summarily denying his notice of post-conviction relief.

¶5 We grant review but deny relief.

¹We observe, however, that a claim that the factual basis for a plea is insufficient can arguably be raised in a successive and untimely proceeding as a claim of actual innocence pursuant to Rule 32.1(h). *See* Ariz. R. Crim. P. 32.4(a); *State v. Johnson*, 181 Ariz. 346, 348-51, 890 P.2d 641, 643-46 (App. 1995). But, even were we to construe Orozco's claim as such, he has not explained how his admissions at the change-of-plea hearing that he stole tools valued at more than \$25,000 and a truck are insufficient to support his convictions. *See generally* A.R.S. §§ 13-1802(A), (G); 13-1814(A), (D). Thus, we do not address this claim further. *State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review).